

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
of the Telecommunications Act of 1996	)	

**ORDER ON REMAND & NOTICE OF PROPOSED RULEMAKING**

**Adopted: February 12, 2002**

**Released: February 21, 2002**

Comment Date: 45 days after publication in the Federal Register  
Reply Comment Date: 30 days after publication in the Federal Register

By the Commission:

**I. INTRODUCTION**

1. The Inmate Calling Services Providers Coalition (ICSPC) seeks reconsideration of certain issues relating to inmate calling services decided in the *Order on Reconsideration*.<sup>1</sup> Section 276 of the Communications Act of 1934, as amended (the Act),<sup>2</sup> directs the Commission to “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.”<sup>3</sup> ICSPC claims that the statute requires the Commission either to preempt state rate caps on local collect calls or permit inmate calling service (ICS) providers to collect an additional per call surcharge above state rate caps on local collect calls. ICSPC also seeks the imposition of certain nonstructural safeguards on inmate calling services provided by the regional Bell operating

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<sup>1</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233 (1996)(*Order on Reconsideration*), *aff'd in part and remanded in part*, *Illinois Pub. Tel. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert. denied sub nom.*, *Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998)(*Illinois*). Henceforth in this order, we refer to the Inmate Calling Services Providers Coalition as “ICSPC,” the “Inmate Coalition,” or the “Coalition.”

<sup>2</sup> See 47 U.S.C. § 276; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act). Hereinafter, all citations to the Act and to the 1996 Act will be to the relevant section of the United States Code unless otherwise noted.

<sup>3</sup> 47 U.S.C. § 276(b)(1)(A).

companies (BOCs). The Commission rejected these claims in the *Order on Reconsideration*.<sup>4</sup>

2. ICSPC, along with numerous other parties, initially sought review of the *Order on Reconsideration* before the United States Court of Appeals for the District of Columbia Circuit and consolidated its appeal under the lead case *Illinois Public Telecommunications Association v. FCC*.<sup>5</sup> In its appeal, ICSPC challenged the Commission's denial of its request for an additional \$0.90 per call surcharge on local inmate calls and the Commission's refusal to impose the nonstructural safeguards that ICSPC sought.<sup>6</sup> The court subsequently severed ICSPC's appeal,<sup>7</sup> and later remanded it at the Commission's request.<sup>8</sup> The Commission issued a Public Notice asking parties to update and refresh the record with respect to the issues raised in ICSPC's appeal.<sup>9</sup>

3. In this order, we conclude that section 276's fair compensation requirement does not require either preemption of state local collect calling caps or imposition of a federally-tariffed surcharge above state rate caps for local inmate calls. We also conclude that ICSPC's requested nonstructural safeguards are not necessary, in light of those that section 276 and our rules already impose. In addition, we initiate a Notice of Proposed Rulemaking to examine the costs associated with the provision of inmate calling services.

## II. BACKGROUND

### A. Prior Payphone Orders and Inmate Calling Services

4. The ICSPC remand is part of a larger proceeding concerning the Commission's implementation of the Act's payphone directives. Section 276 of the Act places two principal requirements on the provision of payphone service. First, the BOCs may neither subsidize their payphone services "from [their] telephone exchange service operations or . . . exchange access operations," nor "prefer or discriminate in favor of [their] payphone service."<sup>10</sup> The statute requires the Commission to implement the subsidization and discrimination prohibitions through

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<sup>4</sup> 11 FCC Rcd at 21269, 21328.

<sup>5</sup> 117 F.3d 555.

<sup>6</sup> See Inmate Calling Services Providers Coalition, Petition for Partial Reconsideration and Clarification (seeking reconsideration of the *Order on Reconsideration*), at 6-11, 14-19 (filed Oct. 21, 1996) (*Petition for Partial Reconsideration and Clarification*); Brief for Petitioner, *Inmate Calling Services Providers Coalition v. FCC* (No. 97-1046 (D.C. Cir. Nov. 21, 1997)).

<sup>7</sup> *Illinois Pub. Telecomm. Ass'n v. FCC*, No. 96-1394, (D.C. Cir. Feb. 7, 1997) (unpublished).

<sup>8</sup> *Inmate Calling Services Providers Coalition v. FCC*, No. 97-1046, 1998 WL 65655 (D.C. Cir. Jan. 30, 1998) (unpublished).

<sup>9</sup> The Common Carrier Bureau Asks Parties to Update and Refresh Record for the Inmate Payphone Service Proceeding, CC Docket No. 96-128, Public Notice, 14 FCC Rcd 7085 (1999) (*Public Notice*).

<sup>10</sup> 47 U.S.C. § 276(a).

nonstructural safeguards that are “at a minimum . . . equal to those adopted in” the Computer III Inquiry.<sup>11</sup> Second, section 276 directs the Commission to “establish a per call compensation plan to ensure that all payphone service providers [(PSPs)] are fairly compensated for each and every completed intrastate and interstate call.”<sup>12</sup> The statute explicitly includes “inmate telephone service” in the definition of “payphone services.”<sup>13</sup>

5. Responding to the statutory mandate, the Commission issued the *First Report and Order*.<sup>14</sup> The Commission subsequently supplemented this order with the *Order on Reconsideration*, and, following two appeals and remands, the *Second Report and Order* and *Third Report and Order* (collectively referred to as the “Payphone Orders”).<sup>15</sup> In its initial comments submitted prior to the *First Report and Order*, and in its petition for partial reconsideration and clarification of that order, ICSPC sought a \$0.90 federally-tariffed inmate calling surcharge, on each and every intraLATA call, on the grounds that state-imposed rate ceilings were inadequate to recover the high costs of inmate calling. ICSPC also sought relief from the BOCs’ alleged subsidization of and discrimination in favor of their payphone services.<sup>16</sup>

6. In the *First Report and Order*, the Commission rejected the ICSPC’s request for additional compensation, reasoning that, although the costs of prison telephone services may exceed those of other payphone services, mandating per call compensation for inmate payphones could lead to a double recovery of costs.<sup>17</sup> With respect to nonstructural safeguards, the

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<sup>11</sup> 47 U.S.C. § 276(b)(1)(C). The Computer III Inquiry refers to an extensive, on-going Commission proceeding concerning the provision of enhanced services. See Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, Report and Order, 104 F.C.C. 2d 958 (1986).

<sup>12</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>13</sup> 47 U.S.C. § 276(d). As a result of this statutory definition, this Order will treat, as a matter of terminology, ICS providers as a subset of PSPs.

<sup>14</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket 96-128, Report and Order, 11 FCC Rcd 20541 (1996) (*First Report and Order*).

<sup>15</sup> *Order on Reconsideration*, 11 FCC Rcd 21233; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Second Report and Order, 13 FCC Rcd 1778 (1997) (*Second Report and Order*), *aff’d in part and remanded in part sub nom. MCI v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) (*Third Report and Order*), *pet. den. sub nom. American Public Comm. Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000).

<sup>16</sup> See *Petition for Partial Reconsideration and Clarification* at 15; see also Comments of Inmate Calling Services Providers Coalition (ICSPC) at 16 (filed June 1, 1996). Except if otherwise indicated, all comments and replies herein cited refer to those submitted in response to the May 1999 *Public Notice*. A list of parties submitting comments in response to the *Public Notice* is included at Appendix A. The list states how each commenter is identified in this order.

<sup>17</sup> See *First Report and Order*, 11 FCC Rcd at 20579 (“[A]t this juncture . . . mandating a per-call amount for inmate payphones, . . . could possibly lead to a double recovery of costs already included in higher-than-average (continued....)”).

Commission required the BOCs to reclassify or transfer payphone assets to nonregulated status to prevent subsidization and discrimination.<sup>18</sup> It stated that “the loops connecting the payphones to the network, the central office ‘coin-service,’ or operator service facilities supporting incumbent LEC payphones” should not be included as payphone assets “because [such assets] are part of network equipment necessary to support basic telephone services.”<sup>19</sup>

7. In the *Order on Reconsideration*, the Commission re-examined the Coalition’s argument that “a special per-call compensation amount is warranted because inmate providers have higher service costs than other PSPs and that the [rates for] the intrastate . . . calls they carry are frequently capped by the states.”<sup>20</sup> The Commission decided that contracts between the inmate calling service providers and the confinement facilities provide “fair compensation,” as required by the statute.<sup>21</sup> The Commission reasoned that, “whenever a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied.”<sup>22</sup>

8. Orders issued during the pendency of the remand have touched upon inmate calling service issues. The *Second Report and Order*, issued in response to the remand the *Illinois* decision, “reaffirm[ed]” the Commission’s refusal “to treat 0+ calls and calls from inmate payphones differently from other payphone calls.”<sup>23</sup> The court of appeals reviewed the *Second Report and Order* and reversed in part, remanding the issue of compensation for 800 and access code calls for further evaluation.<sup>24</sup> After the second remand, the Commission adopted the *Third Report and Order* in which it specifically deferred consideration of the issues here presented.<sup>25</sup>

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operator service rates and special surcharges on end-user phone bills for calls made on these payphones, as argued by Gateway, an inmate payphone provider that opposes a greater per-call amount.”).

<sup>18</sup> *First Report and Order*, 11 FCC Rcd at 20622.

<sup>19</sup> *First Report and Order*, 11 FCC Rcd at 20622.

<sup>20</sup> *Order on Reconsideration*, 11 FCC Rcd at 21250 (citing ICSPC Comments at 2-5 (Oct. 21, 1996)).

<sup>21</sup> *Order on Reconsideration*, 11 FCC Rcd at 21269.

<sup>22</sup> *Order on Reconsideration*, 11 FCC Rcd at 21269.

<sup>23</sup> *Second Report and Order*, 13 FCC Rcd at 1780.

<sup>24</sup> *MCI Telecomm. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998).

<sup>25</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Erratum, 14 FCC Rcd 7105, 7105 (1999) (“We note that the Commission will address in a separate order (1) a special compensation charge for payphone providers who serve inmates, and (2) allegations of subsidies and discrimination on the part of Bell Operating Company payphone providers in favor of their own inmate payphone operations.”).

## B. The Inmate Calling Services Industry

9. Although section 276 classifies inmate calling service as a payphone service,<sup>26</sup> inmate calling services, largely for security reasons, are quite different from the public payphone services that non-incarcerated individuals use. First, virtually all inmate phone calls must be collect; there can be no coin calls or credit card calls. Second, prison security rules typically require that a special automated voice-processing system, rather than a pre-subscribed operator service provider (OSP), process inmate collect calls, in order to provide prison authorities with the ability to screen phone calls.<sup>27</sup> Third, inmate calling services employ numerous blocking mechanisms to prevent inmates from making direct-dialed calls, access code calls, 800/900 calls, or calls to certain individuals like judges or witnesses. In fact, calls from confinement facilities often are limited to certain pre-approved numbers.<sup>28</sup> Fourth, confinement facilities also require that phones be monitored for frequent calls to the same number, a sign of possible criminal activity or a scheme to evade calling restrictions via call-forwarding or three-way calling.<sup>29</sup> Fifth, confinement facilities usually require periodic voice-overlays that identify the call as being placed from a confinement facility, as well as listening and recording capabilities for all calls.<sup>30</sup> Finally, inmate calling systems generally must provide detailed, customized reports for confinement facility officials.<sup>31</sup>

10. Typically, the confinement facility awards a contract to provide calling services by competitive bidding and grants the winning provider a monopoly on all inmate calling services.<sup>32</sup> To have a realistic chance of winning a contract, the bidder must include an amount to cover commissions paid to the inmate facility. In the case of state prisons, which are often located far from major population centers and where consequently most of the traffic is toll traffic and not subject to state ceilings for local calls, the confinement facility monopolies prove sufficiently remunerative to allow the ICS provider to offer generous commissions.<sup>33</sup> In fact,

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<sup>26</sup> See 47 U.S.C. § 276(d).

<sup>27</sup> ICSPC Comments at 7-11; *see also* ICSPC *ex parte* statement at 5 (Sept. 12, 2000) (“the dominant paradigm for the provision of inmate telephone service is the use of dedicated, usually on-site, equipment that is separate from network operator service platforms and that integrates the functions of collect call processing and inmate call monitoring and restriction”).

<sup>28</sup> ICSPC Comments at 7-11.

<sup>29</sup> ICSPC Comments at 7-11.

<sup>30</sup> ICSPC Comments at 7-11.

<sup>31</sup> ICSPC Comments at 7-11.

<sup>32</sup> There is no evidence in the record of this proceeding of any confinement facility that allows more than one company to provide inmate calling services. Most confinement facilities simply contract with one provider. *See* Joint Legislative Audit and Review Commission of the Virginia General Assembly, *Review of the Department of Corrections’ Inmate Telephone System* at 31 (*Virginia Legislative Report*).

under most contracts, the commission is the single largest component affecting the rates for inmate calling service.<sup>34</sup>

11. A number of companies specialize in providing inmate calling services for state prisons, while other companies focus on city and county jails. In the case of local (city and county) jails, ICS providers operate in a largely state-regulated environment. Most calls made from city and county facilities are local or intraLATA toll, and most states impose rate ceilings on local calls.<sup>35</sup> Some of these rate ceilings are based on the incumbent local exchange carriers' (LECs) standard collect calling rates; other ceilings are set specifically for inmate calls.<sup>36</sup>

12. Inmate calling is economically different than other payphone services in two respects. First, inmates have none of the alternatives available to non-incarcerated payphone customers. Inmates only have access to payphones, not cell phones, and inmates lack dial-around capacity.<sup>37</sup> Therefore, neither the inmates who initiate the call nor the individuals who bear the cost of inmate calls – most often the inmates' families – have a choice among providers.<sup>38</sup> Second, the competition that does exist – among ICS providers in the bidding process – does not exert downward pressure on rates for consumers. Instead, perversely, because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates.<sup>39</sup>

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<sup>33</sup> The federal prison system has its own telecommunications policies that were significantly revamped as a result of a class action lawsuit. See United States Dept. of Justice, *Notice of Proposed Settlement and Fairness Hearing, Washington v. Reno*, Nos. 93-217, 93-290 (E.D. Ky. Aug. 2, 1995).

<sup>34</sup> Commissions usually range between 20% and 63%, with most states charging more than 45%. Comments of Citizens United for Rehabilitation of Errants and the Coalition of Families and Friends of Prisoners of the American Friends Service Committee (CURE Comments) at 3 n.6.

<sup>35</sup> ICSPC *ex parte* statement, Attachment ("County Jail Type of Call Distribution") (May 9, 2000).

<sup>36</sup> ICSPC *ex parte* statement, Attachment ("Rates for a 12 Minute Local Inmate Collect Call and State-Imposed Rate Ceilings") (May 9, 2000).

<sup>37</sup> See, e.g., *Virginia Legislative Report* at 6. Dial-around capacity permits the caller, by use of a 10xxx number or other access code number, to access a particular carrier and thus "dial-around" the payphone's pre-subscribed carrier.

<sup>38</sup> This problem is present in some other situations, like airports or bus stations, in which premise owners can exert a "locational monopoly." See *Third Report and Order*, 14 FCC Rcd at 2562. This problem is further discussed in Section III.B, *infra*.

<sup>39</sup> The Commission has recognized in other proceedings how commissions can drive up the price of inmate calls. See, e.g., *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122, 6156 (1998) (*Billed Party Preference Second Report and Order*) ("[B]y virtue of the monopoly contracts they confer, [confinement facilities] have the power and incentive to contract with OSPs that will give them the largest revenues from inmate phones."). The federal judiciary has also recognized this problem. See *infra* note 74.

### III. DISCUSSION

13. This remand of ICSPC's appeal raises the same issues that ICSPC has raised in earlier submissions to the Commission. Specifically, the Coalition seeks additional compensation for local calls as well as nonstructural safeguards and certain anti-discrimination measures. ICSPC asserts that state rate ceilings prevent its members from recovering the high cost of inmate calling services,<sup>40</sup> and seeks either a complete preemption of state rate ceilings or a \$0.90 federal rate element that "may be added to the existing state-approved rates in those states where there is a rate ceiling."<sup>41</sup> It bases this figure on the difference between AT&T's tariffed rates for interstate inmate and non-inmate interstate collect calls, and it argues that this rate difference can serve as a surrogate for the cost difference between inmate and non-inmate local collect calls.<sup>42</sup> In its *ex parte* submission, the Coalition provided cost data that purports to show that inmate calls have approximately \$1.30 more costs than non-inmate costs.<sup>43</sup> Significantly, ICSPC does *not* assert that ICS providers lose money on all of their calls. In addition, the Coalition seeks revision of the existing nonstructural safeguards in our current rules, asserting that section 276 requires additional safeguards and protections.<sup>44</sup>

#### A. What Being "Fairly Compensated" For "Each and Every Call" Means

14. To evaluate ICSPC's claim that its members are not being "fairly compensated" for their local calls, we must determine what "fairly compensated for each and every call" means under section 276. Our prior orders implementing section 276, particularly the *Third Report and Order*, discussed this issue in detail. As the Commission stated there, "[n]either the statute nor the legislative history makes clear . . . what Congress meant by the phrase 'fairly compensated.'"<sup>45</sup>

15. The Commission has previously described in detail the economic principles that control payphone telephony.<sup>46</sup> Here, it is important to point out that the vast majority of payphone costs are fixed and common, even costs for operator assisted calls. Because of high fixed costs, any specific per call compensation rate will generate a profit or loss depending on how many calls are made from a particular payphone.<sup>47</sup> It is difficult, therefore, to determine "fair compensation" for a particular call from a particular payphone because the "cost" of any

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<sup>40</sup> ICSPC Comments at 13.

<sup>41</sup> ICSPC Comments at 14.

<sup>42</sup> ICSPC Comments at 14-15.

<sup>43</sup> ICSPC *ex parte* statement, Attachment at 1-2 (Apr. 6, 2000).

<sup>44</sup> ICSPC Comments at 13-29.

<sup>45</sup> *Third Report and Order*, 14 FCC Rcd at 2569.

<sup>46</sup> *Third Report and Order*, 14 FCC Rcd at 2558-67.

<sup>47</sup> *Third Report and Order*, 14 FCC Rcd at 2566-67.

call depends on how many other calls are made from that payphone. Finally, the Commission determined a payphone that “earns just enough revenue to warrant its placement, but not enough to pay anything to the premises owner” is “a viable payphone . . . because the payphone provides increased value to the premises.”<sup>48</sup> Therefore, location rents are not a cost of payphones, but should be treated as profit.<sup>49</sup>

16. As a matter of economics, it is relatively straightforward to determine fair compensation in cases in which costs are directly attributable to the product and few costs are shared between different products. One would simply calculate the cost of production. Payphones, however, do not fit that model. A payphone has numerous types of “products” (e.g., local, long distance, and collect calls), and each of these products has very few direct, incremental costs (*i.e.*, the incremental costs to a PSP for placing even a collect call are minimal, particularly when compared to its fixed costs). The lion’s share of payphone costs are those that are “shared” or “common” to all services, like the equipment expense and line charges. There are no logical or economic rules that assign these common costs to “each and every call.” Thus, as the Commission recognized in the *Third Report and Order*, “because most payphone costs are fixed and each type of call has a relatively small marginal cost, a wide range of compensation amounts may be considered ‘fair.’”<sup>50</sup>

17. To illustrate this problem, consider a PSP that owns one telephone, with fixed costs of \$100 per month and with 100 calls made per month. (Variable costs are minimal and will be disregarded to simplify the illustration.) Seventy-five local calls are made on the phone per month, each producing \$0.25 in revenue. Twenty-five interstate calls are made, each producing \$4.00 in revenue. The total revenue is \$118.75. How should we determine the per call cost of production so as to determine “fair compensation”? Does the PSP divide total revenue by total costs, thereby earning \$0.1875 on each call? Or, does the PSP (i) divide interstate revenue by costs allocable to interstate calls, thereby making \$3.00 on each interstate call (\$100.00 minus \$25.00 fixed costs, divided by 25 interstate calls) and (ii) divide local revenue by costs allocable to local calls, thereby losing \$0.75 on each local call (\$18.75 revenue minus \$75.00 fixed costs divided by 75 local calls)? Each of these distributions of common cost -- as well as an infinite number of other ones -- results in a different cost of production and, therefore, different “fair compensation.” How can any Commission regulation attempt to solve this intractable problem?

18. Although neither the text of section 276 nor its legislative history answers that question, economic theory applied by the Commission in the context of payphone compensation provides broad parameters for appropriate cost allocation. In the *Third Report and Order*, the

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<sup>48</sup> *Third Report and Order*, 14 FCC Rcd at 2615-16.

<sup>49</sup> *Third Report and Order*, 14 FCC Rcd at 2562, 2615-16.

<sup>50</sup> *Third Report and Order*, 14 FCC Rcd at 2570. See also Paul J. Garfield & Wallace F. Lovejoy, *Public Utility Economics* 140-41 (1964) (“[T]he allocation of joint costs to customer classes of classes of service . . . has no universal or even generally satisfactory solution because joint costs are incapable of ‘accurate’ or ‘certain’ allocation.”).



Commission explained that any cost allocation is correct provided that each type of call recovers at least its incremental costs, and no one service recovers more than its stand-alone cost.<sup>51</sup> “Within these parameters, many different compensation amounts may be considered fair.”<sup>52</sup> For example, because local coin calls should not subsidize dial-around calls, local call revenue should recover the direct costs of local calls and make some contribution to common costs.<sup>53</sup>

19. Beyond the broad parameters outlined above for cost allocation, economic theory does not provide any basis to determine what precise portion of common costs a particular service, or for that matter any one call, must bear. Particular policy goals may dictate a particular cost allocation, however. For example, in the *Third Report and Order*, the Commission, interpreting the statutory mandate to promote widespread payphone deployment, concluded that it should set a payphone compensation rate that would be large enough “to ensure that the current number of payphones is maintained.”<sup>54</sup> To accomplish this goal, the Commission adopted a methodology that permitted a significant contribution to common costs.<sup>55</sup> That policy has little or no application in the prison context because, considering that ICS providers offer commissions, prison payphones are already profitable. Any increase in inmate calling services’ revenue to permit a larger contribution to common costs will not encourage it to provide more payphones but will only encourage higher location commissions. Further, the correctional facility and its communications policy, not the market, often determine the number of prison phones.

20. In its submissions, ICSPC never explicitly states an argument as to the correct cost and revenue allocation under section 276. It simply alleges that its members lose money on local calls in many states that impose rate ceilings.<sup>56</sup> An implicit assumption of ICSPC’s argument is that section 276 requires each service, like local inmate collect calling, to make the same contribution to common costs. If this were required, then *every call* would be required to make identical contributions to common costs in order to satisfy the fair compensation standard.

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<sup>51</sup> *Third Report and Order*, 14 FCC Rcd at 2570. The Commission, drawing on established economic theory, has carefully defined cross-subsidization, stating that as long as the cost attributed to a class of service is “less than or equal to the stand-alone costs but greater than or equal to the incremental cost of that class,” there is no cross-subsidization. Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22134 (1997); *see also* William J. Baumol et al., *Contestable Markets and the Theory of Industry Structure* 352 (1982) (“[I]f a subset of services does not yield revenues sufficient to cover the additional or incremental costs incurred by providing them,” there is subsidization.).

<sup>52</sup> *Third Report and Order*, 14 FCC Rcd at 2570.

<sup>53</sup> The direct or “incremental cost . . . equals all of the additional costs that are incurred due to that service being offered. In the context of payphones, [these costs include] the coin mechanism . . . coin collection costs and termination costs.” *Third Report and Order*, 14 FCC Rcd at 2559.

<sup>54</sup> *Third Report and Order*, 14 FCC Rcd at 2571.

<sup>55</sup> *Third Report and Order*, 14 FCC Rcd at 2571.

<sup>56</sup> ICSPC Comments at 13 (“in each of the nine states, an independent ICS provider would lose money on the average local call”).

In its *ex parte* submissions, this implicit position is made more clear, for ICSPC distributes its fixed costs equally over *all* of its calls in order to arrive at a per call inmate calling cost, a figure that exceeds some state rate ceilings.<sup>57</sup>

21. None of the other parties submitting comments supports ICSPC's bid for additional compensation. AT&T, CURE, Gateway, and MCI all argue that, because an ICS provider negotiates its compensation with confinement facilities and because this market is allegedly robust, ICSPC's claim that its members are losing money carries no weight.<sup>58</sup> If they were losing money, these parties argue, ICS providers would have no incentive to bid on contracts, yet many ICS providers continue to bid. In short, no one would be an ICS provider if ICS providers actually lost money on their operations.

22. In this vein, Gateway recognizes that ICSPC claims that its members are not being fairly compensated for local calls and does not allege that its members are losing money on both interstate and local calls.<sup>59</sup> In other words, ICS providers recover more of their common costs from non-local calls than from local calls, but they make money overall. Therefore, most commenters' "market-based" opposition to additional inmate call compensation is based on the assertion that section 276 only requires "fair" compensation measured by comparing the total revenue and costs of *all* inmate calls, not simply one discrete type of call like local inmate calls.<sup>60</sup>

23. Contrary to ICSPC's implicit position, we conclude that the relevant statutory language does not require *every* call to make an identical contribution to shared and common cost. Section 276 directs the Commission to create a "per call compensation plan" to guarantee fair compensation, but it does not require the Commission to create the most inflexible and intrusive plan. To the contrary, the 1996 Act aimed to create a "pro-competitive, de-regulatory national policy framework."<sup>61</sup> Given the goals of the 1996 Act, we will not construe section 276

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<sup>57</sup> See, e.g., ICSPC *ex parte* statement (Apr. 6, 2000).

<sup>58</sup> AT&T Comments at 2 ("no default compensation is due at all because the negotiated contracts cover all of the payphone provider's costs"); CURE Reply Comments at 5 ("If a service provider does not think it can make money on inmate calling services under a contract with a correctional facility or system, it should not . . . sign the contract."); Comments of Gateway Technologies, Inc. (Gateway Comments) at 6 ("ICSPC first presented its \$0.90 proposal three years ago; its members have continued to operate since then, effectively disproving their inability to earn fair compensation."); MCI Comments at 2 ("Were such surcharge limits as onerous as the Coalition suggests, no carrier would be willing to bid for contracts to service inmate populations.").

<sup>59</sup> Gateway Reply Comments at 4-5.

<sup>60</sup> In an interesting contrast, the RBOC Payphone Coalition endorses the proposition that the "Commission should . . . preempt state-imposed rate ceilings . . . where such a rate ceiling deprives inmate service providers of fair compensation for *some* calls made from their payphones." Comments of the RBOC Payphone Coalition Comments) at 2 (emphasis added). The RBOC Payphone Coalition, however, never clarifies what "some calls" might encompass. In fact, no commenter squarely addresses the legal question of what revenue and cost allocation method satisfies section 276's requirement for "fair compensation for each and every call."

<sup>61</sup> S. Conf. Rep. No. 230, 104<sup>th</sup> Cong., 2d Sess. 1 (1996).

inflexibly to require that each call make an identical contribution.<sup>62</sup> Similarly, section 276 certainly does not require that every submarket of the payphone market with higher costs should receive additional compensation. Following ICSPC's logic, PSPs with payphones in dangerous neighborhoods or those in distant locations that have higher operating costs or less usage should be able to charge higher rates for calls from such phones. Rather, given the de-regulatory aims of the 1996 Act, the critical factor is that the costs must ultimately be recovered, but we will not mandate a particular method of cost recovery. Unless an ICS provider can show that (i) revenue from its interstate or intrastate calls fails to recover, for *each* of these services, both its direct costs and some contribution to common costs, or (ii) the *overall* profitability of its payphone operations is deficient because the provider fails to recover its total costs from its aggregate revenues (including both revenues from interstate and intrastate calls), then we would see no reason to conclude that the provider has not been "fairly compensated."

24. Given this interpretation of "fairly compensated" and the record in this case, ICSPC's members have not demonstrated that they are entitled to further compensation, and we deny, at this time, ICSPC's request to preempt all state ceilings. First, as discussed at greater length below, having reviewed ICSPC's submissions concerning the adequacy of revenues from its local coinless calls, we conclude that ICSPC has not demonstrated that its members cannot recover from that intrastate service all its direct costs and some contribution to common costs as well.<sup>63</sup> Moreover, having failed to demonstrate that local inmate calls do not recover their direct and incremental costs, ICSPC similarly has not shown that the existing revenue recovery mechanism has created an inappropriate subsidy among service categories. Second, with its focus upon local revenue recovery, ICSPC has made no claim that its members fail to recover the total costs of their interstate and intrastate calls in the aggregate. Thus, ICSPC has not demonstrated that the payphone operations of its members are not profitable overall; it has only claimed that a particular category of calls, local coinless inmate calls, fails to recover its fully distributed costs.

25. We also decline to impose the \$0.90 federal surcharge that ICSPC suggests for inmate calling. As we explain above, ICSPC derives this figure from the difference between AT&T's tariffed rates for inmate and non-inmate interLATA calls.<sup>64</sup> ICSPC argues that this is

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<sup>62</sup> See *supra* para. 17.

<sup>63</sup> ICSPC *ex parte* statement, Attachment (Apr. 6, 2000). In the Billed Party Preference for InterLATA 0+ Calls proceedings, the Commission expressed in general terms discomfort with "subsidies" between interstate and intrastate services. Although the Commission declined to offer additional compensation for inmate calling in these proceedings, it did say that "some commenters believe that interstate telecommunications services ratepayers should subsidize providers of operator services whose intrastate operator service rates and surcharges have been capped by a state at a level that is alleged to be 'unfair' or which precludes recovery of the carrier's alleged 'reasonable' costs and profit. Any such subsidy or cross-subsidization would inhibit competition at the intrastate level, contrary to our policies encouraging competition in all telecommunications markets." *Billed Party Preference Second Report and Order*, 13 FCC Rcd at 6154. Because, as we state in the text of this section, ICSPC failed to show that revenue from local inmate calls does not recover their direct costs and contribute to common costs, this is not a case that involves interstate calls subsidizing intrastate calls.

<sup>64</sup> ICSPC Comments at 14-15.

an appropriate proxy for local inmate calls because it will ensure that ICS providers can recover the unique ICS costs not addressed by rate ceilings.”<sup>65</sup>

26. We reject this proposal for two reasons. First, the court of appeals has made clear that proxies may be used as the basis to set compensation only under certain conditions.<sup>66</sup> The court of appeals rejected the determination in the *Order on Reconsideration* that the compensation due to PSPs for 800 and access code calls (dial-around compensation) should be equal to the deregulated local coin rate. There, the Commission had reasoned that coin and coinless calls are “similar,” and, therefore, the coin rates could serve as a proxy for coinless rates. The court held, however, that the Commission’s finding that these two types of calls are similar did not justify its conclusion that “the compensation . . . should be equal.”<sup>67</sup> In this proceeding, ICSPC has merely stated that long-distance call compensation and local calls are “functionally similar” and that, therefore, long-distance call compensation can serve as a proxy for local compensation.<sup>68</sup> ICSPC has not, however, provided evidence beyond generalized assertion that the *costs* of these types of calls are similar.<sup>69</sup> Second, many claim that, given the great diversity of local costs and conditions, a national surcharge on local inmate calls would result in excessive recovery in many states and confinement facilities.<sup>70</sup> ICSPC has submitted data from only a few states, which do not support a national rate. Third, we are not persuaded by ICSPC’s claims that the \$0.90 interstate surcharge functions as “a cost-based surrogate” that can define cost-based “fair” compensation for local calls.<sup>71</sup> A rate differential does not necessarily speak to a cost differential, particularly when these differentials are driven, in large part, by the exorbitant location rents that ICS providers have agreed to pay in the form of commissions. We have previously ruled that location rents should not be treated as costs.<sup>72</sup>

**B. Location Monopolies: High Inmate Calling Rates and the Commissions Paid By ICS Providers to Confinement Facilities**

27. We also conclude that the relief proposed by ICSPC would be unlikely to improve the profitability of ICS providers because much of any additional revenue ICS providers receive would likely be retained by the location monopolist, the confinement facilities, in the form of higher commissions. As discussed above, a confinement facility typically awards a contract to

<sup>65</sup> ICSPC Comments at 14.

<sup>66</sup> *Illinois Pub. Telecomm. Ass’n*, 117 F.3d at 563.

<sup>67</sup> *Illinois Pub. Telecomm. Ass’n*, 117 F.3d at 563.

<sup>68</sup> ICSPC Comments at 14.

<sup>69</sup> *Illinois Public Telecommunications Assoc. v. FCC*, 117 F.3d at 564 (D.C. Cir. 1997) (rejecting the FCC’s “cavalie[r] proclaim[ing] that the costs of local coin calls versus 800 and access code calls are ‘similar’”).

<sup>70</sup> Cincinnati Bell Comments at 2-3.

<sup>71</sup> ICSPC Comments at 15.

<sup>72</sup> See *Third Report and Order*, 14 FCC Rcd at 2615-16.

provide calling service by competitive bidding and gives the winning provider a monopoly on all inmate calling services. To win a contract, a bidder's response to the institution's request for proposals must include an amount to cover commissions paid to the facility. The record in this proceeding indicates that these commissions have typically ranged between roughly 20 percent and 60 percent.<sup>73</sup>

28. In this environment, neither a surcharge nor preemption of rate ceilings would necessarily increase an ICS provider's net revenue. The additional revenue stream likely would drive up the commissions offered by competing ICS providers to the confinement facilities, thereby keeping the ICS providers' net revenue flat.<sup>74</sup> This would not only eliminate any relief afforded by higher compensation rates, but likely result in ICS providers returning to the Commission in a few years with the same concerns regarding the high cost of providing inmate calling services.

29. Under these circumstances, the record in this proceeding strongly suggests that any solution to the problem of high rates for inmates must embrace the states. States are encouraged to examine the issue of the significant commissions paid by ICS providers to confinement facilities and the downward pressure that these commissions have on ICS providers' net compensation and, more important, the upward pressure they impose on inmate calling rates. Furthermore, as CURE points out, these commissions limit incentives for the ICS providers to pass cost savings to consumers through lower rates.<sup>75</sup>

### C. ICSPC's Proposal to Deregulate a Portion of Local Collect Calling

30. Several years after its appeal and voluntary remand, the Coalition submitted in an *ex parte* letter a new proposal, which it characterized as a "short term approach." It asks the Commission to preempt state rate caps on a portion of the local collect call, rather than all local

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<sup>73</sup> Florida House of Representatives, Justice Council, Committee on Corrections, *Maintaining Family Contact When a Family Member Goes to Prison* 29 (1998) (*Florida Report*).

<sup>74</sup> This illustrates the perennial problem of monopolistic rents. Landowners simply increase their rents to absorb any increased revenue from increasing food prices or productivity. As prices for food rise, so do rents – to the detriment of both laborers and society at large. See David Ricardo, *The Principles of Political Economy and Taxation*, ch. 2 (1821) (visited 08/28/01)(<http://www.econlib.org/library/Ricardo/ricP.html>). Although the term "rent" was once used to refer to the rent paid on agricultural land, the term is used generally to refer "that part of the payment to an owner of resources over and above that which those resources could command in any alternative use. Rent is receipt in excess of opportunity cost." James M. Buchanan, *The Limits to Liberty* 5 (1980). Monopolistic rents can occur whenever an owner has exclusive control of a resource, like inmate calling facilities. Rising commissions will likely offset any revenue increases or cost-savings and will not result in higher ICS provider profits or lower consumer costs. The federal judiciary, indeed, a father of the law and economics movement, has recognized how monopolistic location rents drive prices in inmate calling. See *Arsberry v. Illinois*, 244 F.3d 558, 566 (7<sup>th</sup> Cir. 2001)(Posner, J.)(noting that the state of Illinois is a monopolist, "exercising as it does an iron control over access to the inmate market, [that] has rented pieces of the market to different phone companies" and that these companies will pass on much of the rental fee to their customers).

<sup>75</sup> CURE Comments at 5-7.

collect calls rate caps.<sup>76</sup>

31. Typically, rates for intrastate operator services (OS) are set by state public utility commissions.<sup>77</sup> It is pursuant to this authority that states place caps on local collect calling -- collect calls cannot be made without OS; therefore, the power to regulate OS is the power to regulate collect calls.<sup>78</sup> According to the Coalition, some -- but not all -- states divide their rate caps on collect calls into two elements: the operator surcharge and the “local calling rate element.”<sup>79</sup> When the Commission deregulated the local coin calling rate, some states pegged the local calling rate element for collect calls to the deregulated local coin rate as set forth in the incumbent LECs’ tariff; others continued to peg the local calling rate element to the existing regulated coin rate.<sup>80</sup>

32. The Coalition argues that we should preempt the state’s authority to set the “local calling rate element,” mandating that *all* states set the element equal to the deregulated local coin rate.<sup>81</sup> It claims that this action is warranted because numerous states set the local calling rate element too low.<sup>82</sup> The intrastate OSP element would remain subject to state rate caps.

33. When the Commission deregulated payphones, it created a market-based mechanism to ensure that PSPs receive fair compensation for each and every collect call. Collect calls are handled by a payphone’s presubscribed OSP with which the payphone’s PSP has a contractual relationship. Typically, the OSP collects the revenue for the collect call, which, as noted, for intrastate calls is often capped by state regulation, and returns to the PSP a per call commission payment. The PSP can negotiate, therefore, in its contract with OSPs a per call compensation for each collect call.<sup>83</sup> Or, if the OSP and the PSP functions are performed by one company, as is often the case with inmate calls, such company is free to impute whatever

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<sup>76</sup> ICSPC *ex parte* statement (June 28, 2001).

<sup>77</sup> *Billed Party Preference Second Report and Order*, 13 FCC Rcd at 6153-54 (clarifying that states may adopt greater safeguards or more stringent rules regarding intrastate operator services than those adopted by the Commission for interstate services).

<sup>78</sup> *First Report and Order*, 11 FCC Rcd at 20569.

<sup>79</sup> ICSPC *ex parte* statement at 1 (June 28, 2001).

<sup>80</sup> ICSPC *ex parte* statement at 1 (June 28, 2001).

<sup>81</sup> ICSPC *ex parte* statement at 2 (June 28, 2001).

<sup>82</sup> ICSPC *ex parte* statement at 2-3 (June 28, 2001).

<sup>83</sup> *First Report and Order*, 11 FCC Rcd at 20569 (“We conclude further that, in the absence of a contract providing compensation to the PSP for intraLATA 0+ calls, the PSP shall be eligible to collect a per-call compensation.”); *see also Order on Reconsideration*, 11 FCC Rcd at 21238.

price it so desires to its PSP operations.<sup>84</sup>

34. The local calling rate element does not alter this compensation mechanism, and indeed, it could not. The local calling rate element is *not* necessarily the amount that a PSP receives; that amount is determined by contract or, in the case of an entity that performs both the PSP and OSP functions, by the amount that BOCs, LECs, or independent ICS providers impute to their PSP operations. Therefore, the local calling rate element is not the key factor in determining PSP compensation for collect calls. The critical factor is the amount set by negotiation or by imputation.

35. The only possible section 276 compensation claim that could arise in this context is if the state-regulated OSP-cap were so low as to prevent an OSP from offering (or imputing) a payment to the PSP so as to render a PSP's revenue insufficient in a manner described in paragraph 23, *supra*. As discussed above, the Coalition has not demonstrated that its members' operations cannot function properly under the existing OSP caps.

36. In addition, we have reservations about the Coalition's cost data that purport to show that its members lose money on local calls. While the Coalition's data indicate that an average inmate local collect call costs \$2.155, \$1.309 more than the average payphone call, we do not find this data reliable for three reasons.<sup>85</sup>

37. First, the Coalition's comparison between inmate and non-inmate payphones is flawed. ICSPC claims that there are 439 calls from an average payphone. This number is derived from the average number of calls from a "marginal payphone" as defined in the *Third Report and Order*<sup>86</sup> and includes *all* calls, of which operator assisted ("collect") calls are only a small fraction. ICSPC, however, does not separate the revenue and cost for local collect calls from its other services. As a result, there is no way from ICSPC's data to compare local payphone collect calls to local inmate collect calls, and, consequently, ICSPC has not proven the point that local payphone collect calls are profitable in comparison to inmate local collect calls.

38. Second, we find the cost data deficient because ICSPC treats the commissions paid to the inmate facilities as costs rather than profits. As noted earlier, these commissions are location rents<sup>87</sup> that are negotiable by contract with the facility owners and represent an apportionment of profits between the facility owners and the providers of the inmate payphone service. When the commissions are properly treated as profit, rather than as fixed costs, the

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<sup>84</sup> We note that the Commission has defined "operator services" under section 226 of the Act, 47 U.S.C. § 226, to include "any automatic or live assistance to a consumer to arrange for billing or completion, or both" except for "[a]utomatic completion with billing to the telephone from which the call originated . . . ." 47 C.F.R. § 64.708 (i).

<sup>85</sup> ICSPC *ex parte* statement, Attachment ("Inmate Service Fee -- 12 Minute Local Call Cost Analysis") (June 28, 2001).

<sup>86</sup> 14 FCC Rcd at 2612.

<sup>87</sup> See *supra* n. 49 and accompanying text.

result is that ICSPC claims a \$0.73 profit for each call that costs roughly \$1.00 to provide (excluding the high uncollectibles which result at least in part from high profit levels). Thus, *even employing* ICSPC's problematic distribution of common costs, ICSPC claims \$0.73 profit on each call. Given that the deregulated local coin rate ranges from \$0.35 to \$0.50, this profit level is excessive compared to other services the payphone provides. This suggests that inmate calling services that employ collect calling are inefficient. Simply allowing *more* revenue will not enable companies to function profitably but will merely feed an inefficient calling system. In addition, several of ICSPC's figures seem so extraordinary that we cannot accept them without further justification -- which this record fails to provide. ICSPC states that its equipment depreciation and overhead are \$0.334/call for inmate calls, almost *five* times greater than the comparable figure (\$0.074/call) for payphone calls. We acknowledge that inmate calls impose expensive security costs, but they also are cheaper in some respects, as they do not require a coin mechanism or coin collection. Similarly, ICSPC simply asserts without explanation that it should receive a 15% return on investment, as opposed to the 11.25% that is accepted elsewhere in telecommunications.

39. We also are unconvinced by the claim that telephone service to prisons and jails may be threatened if we do not grant the Coalition's requested rate increase. While the Coalition claims that service could be threatened or is dwindling,<sup>88</sup> numerous commenters that provide payphone service state that they are, in fact, adequately compensated for inmate calls, and they should be able to provide service in the event that the Coalition members cannot.<sup>89</sup>

40. Additionally, if rates are so low that state prisons and jails cannot receive service, this should be brought to the attention of the states that regulate OSP rates, which is a more direct way of remedying an allegedly localized problem. The Coalition claims that rates are insufficient only in a few states.<sup>90</sup> By the same token, if a prison cannot find a ICS provider, then it might lower the locational rent and/or require more cost-effective security protections.

41. Finally, we note that, apart from the deficiencies discussed herein, the Coalition's evaluation of the costs of collect inmate payphone calls will be altered, in many cases, by the order we recently adopted concerning payphone line rates.<sup>91</sup> The Coalition has represented in both that proceeding and this proceeding that "the LEC bill for payphone lines and usage is *the*

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<sup>88</sup> See, e.g., ICSPC *ex parte* statement (June 28, 2001), Exhibit (Letter from Connie R. Watson, Sheriff, Surry County, North Carolina, to William E. Kennard, FCC ).

<sup>89</sup> Gateway Comments at 3-6; RBOC Payphone Coalition at 1.

<sup>90</sup> See ICSPC *ex parte* statement, Attachment ("Rates for a 12-Minute Local Collect Call and State-Imposed rate Ceilings") (June 28, 2001).

<sup>91</sup> *In the Matter of Wisconsin Public Service Commission, Order Directing Filing*, CCB/CPD No. 00-01, Memorandum Opinion and Order, FCC No. 02-25 (rel. Jan. 31, 2002)(requiring BOCs to set intrastate payphone line rates in compliance with the cost-based, forward-looking new services test).



*single largest cost element* for PSPs seeking to deploy and maintain payphones . . . .”<sup>92</sup>

42. Further, even assuming *arguendo* that the aggregate cost data submitted by the Coalition were reliable (contrary to our findings above), its approach runs afoul of the principle set forth in the *Illinois* case.<sup>93</sup> As noted, under the Coalition’s proposal, the Commission would mandate a specific rate for the PSP portion of compensation equal to the deregulated coin rate, rather than require that any such rate be set by negotiation or by imputation (where there is no separate OSP). The court of appeals held, however, that payphone rates must be based on actual cost and that hypothetical cost proxies may be relied upon only under highly specific circumstances. The court stated that dial-around compensation rates could not be set on the deregulated coin rate simply because “deregulated local coin rates are the best available surrogates for payphone costs.”<sup>94</sup> The court required the Commission to look at actual cost data, including “contrary data.”<sup>95</sup> Notwithstanding this judicial guidance, here the Coalition has presented no evidence that the costs attributable to the PSP functions its members perform (compensated, it argues, under the “local calling element” portion of applicable state tariffs) equal the cost of a coin call. The costs do not seem similar. In fact the “local calling element” for a collect calls seems *lower* than that for a coin call because a coin call has numerous costs (like coin mechanism, collection and security) that a coinless call does not. Moreover, the Coalition has presented only aggregate data on the costs of collect calls from inmate payphones, and it has not delineated those costs attributable to the PSP functions as distinct from those more properly attributed to the OSP functions performed by the automated payphones commonly used in prisons or jails.

43. Recognizing that equating the local calling element for collect calls to the cost of coin calls is “a vulnerable claim of cost equivalency,”<sup>96</sup> the Coalition responds that the Commission need not find that the local coin costs and the collect calling local element costs are equivalent. Rather, because “ample cost data in the record clearly demonstrates that local collect inmate rates in the state in question are substantially . . . below costs today,” there is no risk of over-recovery. As discussed above, we are not convinced that the record demonstrates that local collect inmate rates are in fact “substantially below cost.”

44. Finally, deregulating the local calling rate element would affect those states in which the public utility commission has determined that the local calling rate element should *not* be equal to the deregulated coin rate. Even if we found the aggregate cost data sufficiently

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<sup>92</sup> *Ex parte* Letter from Vincent Townsend, ICSPC, to Linda Kinney, FCC, Attachment (“Memo on New Services Test”), page 4, Part IIA (Jan. 4, 2002).

<sup>93</sup> *Illinois*, 117 F.3d at 563.

<sup>94</sup> *Illinois*, 117 F.3d at 563.

<sup>95</sup> *Illinois Pub. Telecomm. Ass’n v. FCC*, 117 F.3d at 564.

<sup>96</sup> ICSPC *ex parte* statement, Attachment (“Inmate Service Fee --12 Minute Local Call Cost Analysis”) (June 28, 2001).

reliable to conclude that the *aggregate* compensation for local collect inmate calls is below cost (which we do not), we would still decline to set the compensation for the PSP functions of such calls at the deregulated rate prevailing for coin payphones, because of the lack of record evidence that the costs of these functions are equivalent for coinless inmate payphones and coin payphones.

#### **D. Discrimination and Subsidy Prohibitions**

45. Section 276 explicitly prohibits the Bell operating companies from subsidizing their payphone service directly or indirectly from their regulated services and from discriminating in favor of their payphone services.<sup>97</sup> It directs the Commission to prescribe nonstructural safeguards to implement these prohibitions.<sup>98</sup> These safeguards must be “at a minimum . . . equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding” (the “Computer III safeguards”).<sup>99</sup> The Computer III safeguards were designed to allow BOCs to enter the enhanced services market while preventing them from subsidizing or discriminating in favor of their enhanced services.<sup>100</sup> These safeguards include a wide variety of mechanisms, including comparably efficient interconnection (CEI)<sup>101</sup> and open network architecture (ONA) plans,<sup>102</sup> as well as certain discrimination, customer proprietary network information (CPNI), and accounting safeguards.<sup>103</sup>

46. In the *Payphone Orders*, the Commission determined that accounting safeguards specified in section 276 require “payphone assets to be reclassified [in nonregulated accounting

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<sup>97</sup> 47 U.S.C. § 276(a)(1)-(2).

<sup>98</sup> 47 U.S.C. § 276(b)(1)(C).

<sup>99</sup> 47 U.S.C. § 276(b)(1)(C). The statute specifically refers to “CC Docket No. 90-623.” This docket is but one part of the Computer III proceeding and addressed, *inter alia*, “strengthen[ing] cost allocation and accounting safeguards applicable to all Tier 1 LECs.” Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, Notice of Proposed Rule Making and Order, 6 FCC Rcd 174 (1990).

<sup>100</sup> Robert Cannon, *Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquiries, Enhanced Service Providers and Information Service Providers*, 9 CommLaw Conspectus 49, 56-57 (2001) (*A Guide to the Computer Trilogy*).

<sup>101</sup> CEI plans demonstrate to the Commission that the BOCs will “provide competing enhanced service providers (ESPs) with ‘equal access’ to all basic underlying network services the BOCs [employ] to provide their own enhanced services.” Bell Operating Companies Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd 13758, 13759 (1995) (*Joint Petition*).

<sup>102</sup> After completion of the CEI plans, the Computer III regime requires the “BOCs [to] develop and implement Open Network Architecture (ONA) plans detailing the unbundling of basic network services.” *Joint Petition*, 10 FCC Rcd at 13759.

<sup>103</sup> Cannon, *A Guide to the Computer Trilogy*, 9 CommLaw Conspectus 66-69.

pools] . . . [which] include all facilities related to payphone service.”<sup>104</sup> The Commission did not require reclassification of “loops connecting the payphones to the network, the central office ‘coin service,’ or operator service facilities supporting incumbent LEC payphones because these are part of network equipment necessary to support basic telephone services.”<sup>105</sup> Subsequent Common Carrier Bureau orders applied this precedent and stated that the accounting safeguards apply to payphone equipment only.<sup>106</sup>

47. The Coalition seeks reconsideration of the *Order on Reconsideration* and argues for broader application of the safeguards as well as application of numerous specific safeguards. It supports its call for broader application of the safeguards with allegations that the BOCs are subsidizing their payphone operations from their regulated services.<sup>107</sup>

**1. ICSPC has failed to show subsidization to warrant changing the Commission’s accounting safeguards**

48. As an initial matter, ICSPC has presented no convincing evidence to support its claim that the BOCs subsidize their payphone operations or to warrant reconsideration or revision of our existing rules. Rather, its calls for broader regulatory safeguards proceed from speculative assertions that the BOCs subsidize their inmate calling services. Although the Coalition claims that the “record evidence suggests it is highly likely that some ILECs *are* operating their inmate collect calling at a loss,”<sup>108</sup> we find its evidence lacking. ICSPC supports its subsidization claim with four assertions: (i) under their cost analyses inmate calling cannot be profitable under state local collect calling rate caps; (ii) inmate calling service providers pay high location commissions; (iii) under one request for proposal (RFP), Bell Atlantic stated that it had no bad debt associated with inmate calling services; and (iv) the BOCs are under no “obligation to offer equivalent commissions to their own and independent ‘inmate service’ operations.”<sup>109</sup> We respond to each assertion in turn.

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<sup>104</sup> *First Report and Order*, 11 FCC Rcd at 20622. Alternatively, incumbent LECs could provide payphone services through a structurally separate affiliate.

<sup>105</sup> *First Report and Order*, 11 FCC Rcd at 20622. A carrier electing to provide payphone service through a separate affiliate would transfer the assets in question to its payphone affiliate. *Joint Petition*, 10 FCC Rcd at 13,758.

<sup>106</sup> *See, e.g.*, Local Exchange Carriers Permanent Cost Allocation Manual For the Separation of Regulated and Nonregulated Costs, AAD 97-9 et al., Memorandum Opinion and Order, 12 FCC Rcd 15145, 15153 (1997) (“There is no support in the Payphone Order or the Payphone Reconsideration Order for the contention that BOCs or other ILECs are required to provide collect calling as a nonregulated service when used with inmate payphones.”); Local Exchange Carriers Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, AAD 97-9 et al., Memorandum Opinion and Order, 1999 WL 591753 at \*8, para. 11 (Aug. 6, 1999) (“inmate collect calls . . . are specifically excepted from deregulation in the Payphone Order”) (*1999 CAM Order*).

<sup>107</sup> ICSPC Comments at 18-19.

<sup>108</sup> ICSPC *ex parte* statement at 8 (Sept. 12, 2000).

<sup>109</sup> ICSPC *ex parte* statement at 8-9 (Sept. 12, 2000).

49. First, the Coalition's cost analysis does not demonstrate subsidization because it does not show that inmate calling services lose money either overall or on local calling services (under our accepted cost allocations).<sup>110</sup> Thus, BOCs could easily participate in the inmate calling market without subsidizing their ICS operations. Second, high location commissions could suggest subsidization if calling rates were unusually low. The record, however, shows that inmate calling rates are sufficient and, in many markets, quite high. Therefore, it seems quite reasonable to conclude that inmate calling provides sufficient revenue for both confinement facilities and ICS providers. Third, the single RFP from Bell Atlantic pertaining to bad debt establishes little. As discussed below, the non-regulated BOC PSP "sells" its receivables to the BOC OSP for a commission; technically, the BOC PSP does not bear the cost of bad debt. Fourth, the RBOC Payphone Coalition has made clear representations in this proceeding that it does, in fact, offer "equivalent commissions to their own and independent inmate service operations."<sup>111</sup> In short, ICSPC has failed to substantiate a claim of subsidization that could warrant revision of our rules.

## **2. The Commission's existing rules provide adequate safeguards**

50. Our existing rules adequately implement the statutory prohibitions against subsidization and discrimination and in no way require the modifications that ICSPC seeks. Primarily, ICSPC argues that section 276 requires the BOCs to allocate, pursuant to Part 64 of our rules, all revenue and costs related to inmate calling service, including operator services and bad debt, into nonregulated costs pools.<sup>112</sup> Currently, our rules only apply such safeguards to equipment, not all the services needed for a collect call.<sup>113</sup> Section 276 is little help in evaluating ICSPC's request. The statute states that Computer III safeguards must be applied to "payphone service" and simply defines "payphone service" as "the provision of public or semi-public pay telephone service, the provision of inmate telephone service in correctional institutions, and any ancillary services."<sup>114</sup>

51. ICSPC argues that operator services are an integral part of *collect* inmate calls, so operator services supporting payphones should be reclassified as nonregulated.<sup>115</sup> In addition to re-allocating operator service expense, it argues that bad debt and billing and collection expenses

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<sup>110</sup> See Section III.A *supra*.

<sup>111</sup> See RBOC Payphone Coalition *ex parte* statement at 4 (June 7, 2000) ("LEC operator services are available to independents on the same terms and conditions as to its affiliated inmate operation.").

<sup>112</sup> See ICSPC Comments at 21, 23-24; ICSPC *ex parte* statement, Attachment ("Bad Debt -- Uncollectables and Unbillables") at 2 (May 17, 2000).

<sup>113</sup> 1999 CAM Order, 1999 WL 591753 at \*8, para. 11 ("That [collect] calls are processed by deregulated payphone CPE [customer premise equipment] does not change the fact that they involve operator services that are specifically excepted from deregulation by the Payphone Order.").

<sup>114</sup> 47 U.S.C. § 276(b)(1)(C); 47 U.S.C. § 276(d).

<sup>115</sup> ICSPC Comments at 22-23.

also must be allocated to nonregulated cost pools because they are major costs to inmate calling services.<sup>116</sup> The Coalition alleges that the existing definition of payphone services enables the BOCs to allocate their payphone costs to their regulated services while assuring that they do “not assume the financial responsibility and risk associated with the provision of the collect calling service for inmates.”<sup>117</sup> In inmate calling services, this problem is acute because bad debt (which is quite high for inmate calling) is allegedly commingled with BOC receivables, allowing BOCs “to effectively use revenues from other services to subsidize the costs and lost revenue associated with their bad debt from ICS.”<sup>118</sup> The Coalition also argues that other costs, like validation fees, must be included in nonregulated cost pools because they support collect calls from payphones.<sup>119</sup>

52. On the other hand, the RBOC Payphone Coalition argues that operator services are regulated services that should not be separated into nonregulated cost pools.<sup>120</sup> It argues that the current relationship between the BOC PSP and BOC OSP provides an adequate accounting safeguard. As it explains, the relationship requires the BOC OSP to pay a commission or per call compensation to the BOC PSP for each collect call.<sup>121</sup> The RBOC Payphone Coalition states that the BOC PSP’s revenue (the commission or per call compensation) adequately reflects the value of the call to the BOC OSP.<sup>122</sup> The BOC OSP will pay no more for the call than the revenue it will produce -- minus costs like bad debt and operator services. As a consequence, the nonregulated revenue the BOC PSP receives reflects its nonregulated costs, and cost follows revenue, as accounting safeguards require. Further, the BOCs argue that, because most LECs operate under price-cap regimes, they have no incentive to subsidize because any losses they suffer in OSP provisioning cannot be made up through other services.<sup>123</sup>

53. In order to determine whether the Inmate Coalition’s or the RBOC Payphone

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<sup>116</sup> ICSPC Comments at 20-21; ICSPC *ex parte* statement, Attachment, “Bad Debt -- Uncollectables and Unbillables) at 1 (May 17, 2000) (“The extraordinary level of bad debt in inmate telephone service exacerbated the illegal subsidies . . .”).

<sup>117</sup> ICSPC Comments at 20.

<sup>118</sup> ICSPC Comments at 21.

<sup>119</sup> ICSPC Comments at 22-23.

<sup>120</sup> RBOC Payphone Coalition *ex parte* statement at 2-4 (Nov. 27, 2000) (arguing that the Commission’s definition of “operator services” cannot include inmate calling).

<sup>121</sup> RBOC Payphone Coalition Reply Comments at 3; RBOC Payphone Coalition *ex parte* statement, Attachment (“Inmate Payphones: Clearing Up Misconceptions”) at 1-2 (June 7, 2000) (“When a customer makes an intraLATA or local collect call from a LEC-affiliated payphone, the LEC may provide the operator services; it would then pay a commission to the LEC-PSP, which pays a commission to the location provider. The revenues (and costs) of the operator services are booked to regulated operations.”).

<sup>122</sup> RBOC Payphone Coalition *ex parte* statement at 2-4 (June 7, 2000).

<sup>123</sup> RBOC Payphone Coalition *ex parte* statement at 3 (June 7, 2000).

Coalition's suggested accounting safeguards are appropriate, we must recognize that the primary purposes of Computer III accounting safeguards are to prevent BOCs "from improperly shifting costs from their unregulated to their regulated offerings" and to ensure proper allocation of common costs.<sup>124</sup> In other words, the accounting safeguards must guarantee that regulated revenue properly follows regulated costs, and unregulated revenue follows unregulated costs.<sup>125</sup> From that perspective, it makes little difference whether the Commission adopts the Inmate Coalition's or the RBOC Payphone Coalition's accounting safeguards.

54. Under either approach, nonregulated costs will follow nonregulated revenue without improper shifting. In the Inmate Coalition's suggested approach, the BOCs allocate all services used to support payphone services to nonregulated cost pools under Part 64, along with other costs associated with payphone revenue, like billing and collection, operator services and validation. The revenue received from the collect payphone calls would offset these costs. Under the RBOC Payphone Coalition approach, the costs of providing payphone equipment would be allocated to nonregulated cost pools under Part 64 and the commission or per call compensation revenue paid by the BOC OSP to the BOC PSP would offset such costs. This revenue would accurately reflect the operator service, billing and collection, and other costs that the BOC OSP must bear to obtain the collect call revenue from end-users. Indeed, the BOCs explicitly state that they offer these commissions to all parties, not just their own PSPs.<sup>126</sup> In addition, services provided to BOC PSPs, like LIDB (line identification database) dips, would be charged to BOC PSP cost pools. Thus, the revenue the BOC payphone produced in commissions or per call compensation would offset the costs of the payphone equipment and services that the BOC PSP "purchases" from the BOC OSP. Finally, the Inmate Coalition's suggested approach would impose extensive and burdensome accounting and reporting requirements in order to determine what elements of the regulated BOC "support" an inmate collect call. The RBOC Payphone Coalition's accounting method, on the other hand, is far less burdensome and involves far less administrative effort, yet achieves the same ends.

55. We observe that there is a factual dispute in the record concerning the commissions that BOCs pay their PSPs. The Inmate Coalition claims that the BOCs do not offer their commissions generally or on a non-discriminatory basis.<sup>127</sup> All parties appear to agree that

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<sup>124</sup> *Third Computer Inquiry*, 104 F.C.C.2d at 1074.

<sup>125</sup> See A.N. Mosich & E. John Larsen, *Intermediate Accounting* 23 (5<sup>th</sup> ed. 1963) ("The matching principle means that after the revenue for an accounting period has been determined, the costs associated with this revenue must be deducted to measure net income.").

<sup>126</sup> RBOC Payphone Coalition *ex parte* statement at 4 (June 7, 2000).

<sup>127</sup> Compare RBOC Payphone Coalition *ex parte* statement at 4 (June 7, 2000) with ICSPC *ex parte* statement (Attachment, "Response to the RBOCs' November 27, 2000 *Ex Parte* Letter" at 4) (Dec. 20, 2000) (including an e-mail to Verizon which appears to indicate that Verizon does not offer a commission billing arrangement to independent PSPs).

these commissions must be generally offered on a transparent and non-discriminatory basis.<sup>128</sup> We agree with parties that this is the only permissible application of section 276.

56. Finally, ICSPC claims that, because as a statutory matter “operator services” does not include inmate calling, *all* intrastate inmate calling costs and revenue are not subject to state regulation (as are other intrastate operator services). Because inmate calling is not subject to state regulation, intrastate inmate calling costs are *not* part of the BOC’s regulated operations and must be placed in deregulated cost pools -- or so ICSPC argues.<sup>129</sup> To support its argument, ICSPC points out, quite accurately, that in implementing the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), the Commission stated that “the carrier providing service to inmate-only phones at correctional institutions would not fall under the definition of ‘provider of operator services.’”<sup>130</sup>

57. The RBOC Payphone Coalition, on the other hand, responds that the Commission’s conclusion that operator services do not include inmate calling services were due to the “exceptional set of circumstances” that inmate calling presents and has no application to the question whether operator services are “included within the definition of inmate payphone services.”<sup>131</sup>

58. We need not rest our decision on the answer to this statutory question. Whether or not intrastate inmate operator services are regulated does not necessarily determine the appropriate nonstructural safeguards under section 276. If the BOC imputes a commission rate to its ICS division and if that rate is transparent and available to all, the anti-subsidization and anti-discrimination requirements of section 276 will be met -- just as if inmate operator services were segregated into a distinct cost pool. Further, we cannot accept ICSPC’s suggestion to apply safeguards only to inmate calling, but not to other collect calling services. ICSPC justifies applying safeguards only on inmate calling because of its unique features, such as the predominance of collect calling and its use of dedicated, on-site equipment, that, it contends, render inmate calling different from “payphone-accessible operator service.”<sup>132</sup> There are, however, many varieties of collect payphone services. We find it inappropriate to apply special

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<sup>128</sup> RBOC Payphone Coalition *ex parte* statement (“Inmate Payphones: Clearing Up Misconceptions”) at 4 (June 7, 2000) (“LEC operator services are available to independents on the same terms and conditions as to its affiliated inmate operation.”).

<sup>129</sup> Compare ICSPC *ex parte* statement at 2 (Sept. 12, 2000) (“inmate services do not fall within the Act’s definition of ‘operator service’”) with RBOC Payphone Coalition *ex parte* statement at 2-3 (Nov. 27, 2000) (arguing that neither the Commission’s *Payphone Orders* nor sections 276 and 226(a)(7) require that inmate calling services receive different accounting treatment).

<sup>130</sup> ICSPC *ex parte* statement, Attachment at 3 (Sept. 12, 2000) (citing Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744, 2752 n.30 (1991)).

<sup>131</sup> RBOC Payphone Coalition *ex parte* statement at 2 (Sept. 12, 2000) (citing Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744, 2752 (1991)).

<sup>132</sup> ICSPC *ex parte* statement at 3 (Sept. 12, 2000).

nonstructural safeguards to various subsets of these services without a complete record on all types of collect calls; such a record is here lacking.

59. Beyond its request for broader application of the accounting safeguards, ICSPC argues for a variety of revisions to our nonstructural safeguards. ICSPC asks the Commission to modify our rules to require that: (i) the BOCs offer billing and collection to independent ICS providers on the same terms and conditions that they are provided to BOC PSPs;<sup>133</sup> (ii) the BOCs report to independent ICS providers on a timely basis when the billed party has denied responsibility for the ICS providers portion of its bill;<sup>134</sup> (iii) the BOCs treat all inmate calling services identically with respect to local service cut-offs;<sup>135</sup> (iv) the BOCs provide account fraud information on a nondiscriminatory basis to independent ICS providers on a real-time basis;<sup>136</sup> (v) account fraud information be provided to BOC PSPs on an arm's-length basis;<sup>137</sup> (vi) BOC PSPs be provided LIDB validation dips on the same terms as they are provided to independent PSPs;<sup>138</sup> (vii) the BOCs provide "any basic network function . . . supporting the BOCs' inmate calling services" under tariff;<sup>139</sup> and, finally, (viii) the BOCs forward independent ICS provider calls to competitive LECs in the same fashion as the BOCs' own calls.<sup>140</sup>

60. In general, our response to all of these requests is the same. We need not change our rules in response to speculative and unsupported claims of subsidization, as we have found ICSPC's to be. If any party believes that improper subsidization occurs, it should bring a complaint under section 208 of the Act. Nonetheless, we address each of these requests in turn.

61. First, ICSPC wants the BOCs to offer billing and collection services on a stand alone basis to independent ICS providers on the same terms and conditions they are provided to BOC PSPs.<sup>141</sup> We reject this request for reconsideration. The Commission has ruled that the billing and collection services are "incidental to communications," beyond the scope of Computer III, and need not be provided on a nondiscriminatory basis under the Computer III safeguards.<sup>142</sup> Moreover, we have no evidence that BOCs are discriminating against independent

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<sup>133</sup> See, e.g., ICSPC Comments at 26.

<sup>134</sup> ICSPC Comments at 26.

<sup>135</sup> ICSPC Comments at 26-27.

<sup>136</sup> ICSPC Comments at 28-29.

<sup>137</sup> ICSPC Comments at 29.

<sup>138</sup> ICSPC Comments at 29-30.

<sup>139</sup> ICSPC Comments at 29.

<sup>140</sup> ICSPC Comments at 30-31.

<sup>141</sup> ICSPC Comments at 25-26.

<sup>142</sup> Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp., CC Docket No. 92-256, Memorandum Order and Opinion, 11 FCC Rcd 1388, 1427 (1995) (*GTE ONA Order*) ("the Commission . . . (continued....)



PSPs. Further, billing and collection is available from third parties; it is not a bottleneck service that all independent PSPs need in order to compete effectively with a BOC PSP. If ICSPC members cannot receive billing and collection from a BOC, it can obtain these services at presumably competitive rates from an independent billing and collection clearinghouse; therefore, we see no reason to extend our existing safeguards.

62. Second, ICSPC wants the BOCs to report to independent ICS providers when the billed party has “denied responsibility for the ICS provider’s portion of its bill on a timely basis.”<sup>143</sup> ICSPC alleged that billed parties often claim that they never accepted charges for collect calls and refuse to pay the charges as they appear on their local phone bill.<sup>144</sup> This refusal is often not communicated to the independent ICS provider for months, a delay that can result in large costs to the ICS provider. Because the Computer III safeguards apply to “information that is useful for bill preparation,” the BOCs must provide this information on a non-discriminatory basis.<sup>145</sup> Our rules already provide for what ICSPC requests.

63. Third, ICSPC asks that the BOCs treat all inmate calling services identically with respect to local service cut-off.<sup>146</sup> State law often governs procedures for disconnect for non-payment through the so-called “Do Not Disconnect” or “DND” laws.<sup>147</sup> Section 276 already prohibits any BOC from “discriminat[ing] in favor of its payphone service.”<sup>148</sup> BOCs must treat collect calls from their PSPs identically to those from independent PSPs.

64. As its fourth and fifth requests, respectively, ICSPC wants the BOCs to provide account fraud information in a nondiscriminatory manner to independent ICS providers on a real-time basis,<sup>149</sup> and to provide this account fraud information to BOC PSPs on an arms-length basis.<sup>150</sup> Both requests have three related responses. As an initial matter, account fraud

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. [will not] require BOCs to offer billing and collection services to ESPs, because those services are incidental to communications and need not be tariffed”).

<sup>143</sup> ICSPC Comments at 26.

<sup>144</sup> ICSPC Comments at 26.

<sup>145</sup> *GTE ONA Order*, 11 FCC Rcd at 1427.

<sup>146</sup> ICSPC Comments at 26.

<sup>147</sup> See Alexander Belinfante, *Telephone Penetration By Income By State*, 6-9 (Common Carrier Bureau, Industry Analysis Division)(Mar. 2000) (listing states with DND laws or policies and analyzing their effect on subscription penetration). For an example of a DND law, see CA Pub. Util. § 2890 (c)(i) (1999).

<sup>148</sup> 47 U.S.C. § 276(a)(1).

<sup>149</sup> ICSPC Comments at 26-27. This information includes customers’ social security number and customer code, service establishment date, disconnect date and reason for disconnect, additional lines, previous telephone numbers, service restrictions, class of service, payment history, calling patterns/returns, credit history and features, like call forwarding or three-way calling. *Id.*; see also ICSPC *ex parte* statement, Attachment at 10 (Sept. 12, 2000).

<sup>150</sup> ICSPC Comments at 28-29.

information is arguably an integral part of the OSP function; it cannot be unbundled. Independent ICS providers can take advantage of this information by subscribing to the BOC OSP.<sup>151</sup> The rates an independent ICS provider pays, and the commission it receives, must be identical to that of the BOC PSPs. Therefore, there is no need to provide unbundled account information, either on an arms-length basis or a real-time basis. Section 276's anti-discrimination prohibitions will be satisfied provided that BOCs offer their OSP service and commission compensation on a transparent and non-discriminatory basis to both their PSPs and independent PSPs.<sup>152</sup>

65. Further, ICSPC has failed to indicate what account fraud information it seeks or allege how the BOC PSPs use such account fraud information. ICSPC claims that "[i]nformation maintained by the 'regulated' ILEC entity regarding its local service customers and local calling patterns is very useful in preventing fraudulent calling by inmates and in reducing uncollectable revenue."<sup>153</sup> We have no evidence in the record of this proceeding that BOCs use information in this way; the BOCs, at least in other proceedings, deny this.<sup>154</sup> We cannot in a rulemaking proceeding prescribe rules to correct problems that are inadequately defined or explained in the record. Last, if the BOC OSP somehow possesses some type of account fraud information that it uses exclusively for its own operations, then our rules already provide that the BOCs must provide such information on a nondiscriminatory basis.<sup>155</sup>

66. As for its sixth request, ICSPC wants the BOCs to provide LIDB validation dips on the same terms as they are provided to independent PSPs. As the RBOC Payphone Coalition points out, LEC PSPs already access LIDB on the same tariffed terms and rates available to independent ICS providers.<sup>156</sup> Seventh, ICSPC requests that all BOC transmission, switching, or inmate call processing functions used by the BOC PSPs be purchased at tariffed rates.<sup>157</sup> Again,

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<sup>151</sup> RBOC Payphone Coalition *ex parte* statement at 4 (June 7, 2000) ("To the extent LECs have developed fraud control procedures as part of their OS operations, these same procedures are available to independents who purchase LEC OS.").

<sup>152</sup> We observe that there is a factual dispute as to whether a "tariffed OS offering" exists. ICSPC *ex parte* statement, Attachment at 10 (Sept. 12, 2000). In this ruling, we only point out what our regulations require. If any party alleges a violation of our rules, it may bring a complaint.

<sup>153</sup> ICSPC *ex parte* statement at 10 (Sept. 12, 2000).

<sup>154</sup> Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for the Provision of Basic Payphone Services, CC Docket No. 96-128, Order, 12 FCC Rcd 5857, 5864 (1997) ("SWBT represents that its payphone operations do not use any network-based call control and call processing functions.").

<sup>155</sup> *GTE ONA Order*, 11 FCC Rcd at 1427.

<sup>156</sup> RBOC Payphone Coalition Reply at 29.

<sup>157</sup> ICSPC Comments at 5.

as the RBOC Payphone Coalition points out, they already are.<sup>158</sup>

67. Finally, ICSPC asks that the BOCs forward independent ICS provider calls to competitive LECs in the same fashion as the BOCs forward their own calls.<sup>159</sup> ICSPC alleges that BOCs do not inform ICS providers on a real time basis that a customer is being served by a competitive LEC.<sup>160</sup> Rather, whenever an ICS provider places a call, the ICS provider performs a LIDB query that indicates whether the line is valid and that provides billing name and address<sup>161</sup> but does not indicate whether the line has been resold or transferred as an unbundled network element (UNE) to a competitive LEC.<sup>162</sup> If the number is served by a competitive LEC, the call will be processed, regardless of whether the ICS provider has a billing arrangement with that particular competitive LEC. While the LEC or BOC will charge the ICS provider for this call, the ICS provider will not be able to bill for such a call and may not learn until several months later that a competitive LEC carried the call, in what is termed a “Code 50 Reject.”<sup>163</sup> Many competitive LECs refuse to enter into billing relationships with ICS providers, and, according to ICSPC data, its members’ unbillables have risen accordingly.<sup>164</sup> ICSPC asks that BOCs treat calls to competitive LECs in the same manner, whether such call originated from BOC PSPs or independent PSPs. This would require BOCs to provide adequate information so that ICS providers could block a call to a number served by a competitive LEC, and request that the called-party’s competitive LEC enter into a billing relationship with the ICS provider.

68. The RBOC Payphone Coalition responds that competitive LEC information is available on the Local Number Portability (LNP) database. That database “indicates whether a

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<sup>158</sup> RBOC Payphone Coalition Comments at 5. ICSPC has produced no evidence that BOCs fail to provide unbundled elements as our regulations require. *First Report and Order*, 11 FCC Rcd at 20616; *Order on Reconsideration*, 11 FCC Rcd at 21308 (“any basic network services or unbundled features used by a LEC’s operations to provide payphone services must be similarly available to independent payphone providers on a nondiscriminatory, tariffed basis”). Further, BOCs have already recognized that they must charge their own PSP divisions tariffed rates for the services provided to such divisions, and ICSPC has not produced any evidence that the BOCs fail to do this. *See, e.g.*, Southwestern Bell Telephone Company’s Comparably Efficient Interconnection Plan for the Provision of Basic Payphone Services, CC Docket No. 96-128, Order, 12 FCC Rcd 5857, 5889 (1997) (“SWBT asserts its ICS [inmate calling service] will make use of SWBT operator services, which will be purchased from SWBT’s state tariffs in the same manner that any other ICS provider may purchase them.”).

<sup>159</sup> ICSPC Comments at 30-31.

<sup>160</sup> ICSPC Comments at 30.

<sup>161</sup> ICSPC Comments at 29.

<sup>162</sup> ICSPC *ex parte* statement, Attachment (“Bad Debt -- Uncollectables and Unbillables” at 3) (May 17, 2000) (“Currently, the call validation database (“LIDB”) on which independent inmate service providers must rely provides no indication that a called party has changed telephone companies from an incumbent LEC to a CLEC.”); *see also* ICSPC *ex parte* statement, Attachment at 11 (Sept. 12, 2000).

<sup>163</sup> ICSPC Comments at 30.

<sup>164</sup> ICSPC Comments at 25.

called number is served by the incumbent LEC or CLEC.”<sup>165</sup> To ensure that a call is properly forwarded, an ICS provider must merely query the LNP database, a procedure followed by all BOC OSPs. Because the LNP database is available on an equal basis to both the BOC OSP and the independent ICS providers, there is no need to reconsider our rules on this matter. To the extent that the competitive LECs refuse to enter into billing agreements with other carriers, both the BOC and the independent ICS provider face the same problems.<sup>166</sup> If the BOCs can obtain this information concerning carrier service in a manner not requiring two database dips (*i.e.*, they have some way of knowing what lines have been resold to competitive LECs without recourse to the LNP and LIDB databases), it must offer this information to all PSPs on a non-discriminatory basis.

69. In sum, we decline to modify our accounting safeguards in the manner requested by ICSPC, in part because our existing rules already provide for much of the relief they are asking. To the extent an independent ICS provider believe that a BOC PSP is engaging in discrimination or otherwise failing to comply with these existing obligations, it should bring a complaint pursuant to section 208 of the Act.

#### IV. NOTICE OF PROPOSED RULEMAKING

70. We begin this Notice of Proposed Rulemaking to seek comment on issues related to the provision of inmate payphone service. Section 276 of the Communications Act of 1934 (the Act), as amended by the Telecommunications Act of 1996, directs the Commission to establish rules related to the provision of payphone service. Section 276 was promulgated with the dual goals of promoting competition among payphone providers and promoting the widespread deployment of payphone service.<sup>167</sup> The statute also directs the Commission to prescribe regulations that ensure the fair compensation of payphone providers for each and every call using their payphone.<sup>168</sup> The statute specifically includes the provision of inmate telephone service in correctional institutions within the definition of payphone service.<sup>169</sup>

71. In addition to section 276, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).<sup>170</sup> Its purpose, *inter alia*, is “to protect consumers

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<sup>165</sup> RBOC Payphone Coalition *ex parte* statement, Attachment at 4 (June 7, 2000).

<sup>166</sup> RBOC Payphone Coalition *ex parte* statement, Attachment 4 (June 7, 2000).

<sup>167</sup> 47 U.S.C. § 276(b) (Commission directed to act “[i]n order to promote competition among payphone service providers and promote the widespread deployment of payphone services”).

<sup>168</sup> 47 U.S.C. § 276 (b)(1)(A) (requiring the Commission to establish a per call compensation plan to “ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call”).

<sup>169</sup> 47 U.S.C. § 276(d) (“the term ‘payphone service’ means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions”).

<sup>170</sup> Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), Pub. L. No. 101-435, 104 Stat. 986 (1990)(codified at 47 U.S.C. § 226).

who make interstate operator services calls from pay telephones . . . against unreasonably high rates and anti-competitive practices.”<sup>171</sup> For the most part, the Commission has exempted inmate calling services from TOCSIA’s consumer protections on the grounds that inmate services constitute “an exceptional set of circumstances.”<sup>172</sup>

72. We recognize that the provision of inmate calling services implicates important security concerns and, therefore, involves costs unique to the prison environment. As discussed in the accompanying order, a prison payphone provider typically is contractually obligated to monitor and control inmate calling to prevent abuse and ongoing criminal activity and to assist in criminal investigations.<sup>173</sup> Correctional facilities must balance the laudable goal of making calling services available to inmates at reasonable rates, so that they may contact their families and attorneys, with necessary security measures and costs related to those measures. For this reason, most prisons and jails contract with a single carrier to provide payphone service and perform associated security functions. Thus, legitimate security considerations preclude reliance on competitive choices, and the resulting market forces, to constrain rates for inmate calling. We initiate this rulemaking proceeding to explore whether the current regulatory regime applicable to the provision of inmate calling services is responsive to the needs of correctional facilities, ICS providers, and inmates, and, if not, whether and how we might address those unmet needs.

73. We seek comment generally on costs associated with the provision of inmate calling services. The record developed in the proceeding leading to the accompanying order suggests that rates for inmate calling services have increased over the last decade, yet ICS providers may not reap the benefits of these higher rates. As discussed in that order, high inmate calling rates may be partially attributable to the absence of market forces.<sup>174</sup> The correctional institution exercises exclusive control over access to the inmate calling market. It can demand in location commissions the highest amounts the market will bear and will absorb any increase in consumer rates or any efficiency gains of ICS providers. The incentive for those bidding for a contract to provide inmate calling services is to offer higher commission payments than others bidding. This results in an upward spiral of increasing location rents and increasing inmate calling rates, to the detriment of the ICS providers and, because these calls are largely collect, to the friends and families of inmates who ultimately bear the costs of the calls. On the other hand, higher commissions may give confinement facilities a greater incentive to provide access to

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<sup>171</sup> S. Rep. No. 439, 101<sup>st</sup> Cong., 2d Sess. 1 (1990); *see also* H.R. Rep. No. 213, 101<sup>st</sup> Cong., 1st Sess. 2 (1989) (“The purpose of [the Act] is to protect telephone consumers against unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.”).

<sup>172</sup> Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744, 2752 (1991); *see also* Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92-77, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274, 7301 (1996) (neither TOCSIA nor Commission rules require telephones for use only by prison inmates to be unblocked; prisons often install and maintain security equipment for a number of legitimate reasons involving security and other government prerogatives”).

<sup>173</sup> *See supra* paras. 9-10.

<sup>174</sup> *See supra* note 74 and accompanying text.

telephone services. Commission proceeds may be dedicated to a fund for inmate services or assigned to the state's general revenue fund. We seek comment on commissions demanded by correctional institutions, whether and how any states have addressed the relationship between these commissions and inmate calling rates, and on any factors unique to the provision of inmate calling services that affect the profitability of ICS operations.

74. As we explain in the accompanying order, we reject ICSPC's requests that we preempt state local collect calling rate caps or impose a per call surcharge above any such rate caps. The cost data contained in the record of that proceeding did not establish either that ICSPC members do not recover the direct costs of local inmate collect calls or that they do not recover, in the aggregate, the total costs of their interstate and intrastate calls.<sup>175</sup> We seek additional data, to the extent such data can be developed, that might overcome the problems we identified. In particular, we seek cost and revenue data related to local collect calls made from confinement facilities, separate from data related to other services offered by payphone providers. We also seek support and justification for any costs related to inmate calling services (such as depreciation, overhead, or return on investment) that ICS providers assert differ from the costs incurred with respect to ordinary payphones. We also expressed concern that the relief sought by ICSPC might not improve the profitability of ICS providers because additional revenue might be retained by the confinement facilities in the form of higher commissions.<sup>176</sup> We seek comment, therefore, on whether and how the ICSPC proposals might be modified to ensure that increased revenues are in fact retained by the ICS providers. In addition, we seek comment regarding any other proposals that might address the problems identified by ICSPC.

75. In the case of local (city and county) jails, ICS providers operate in a largely state-regulated environment. Most calls from city and county facilities are intraLATA toll or local calls, and most states impose rate ceilings on local calls. Some of these rate ceilings are based on the incumbent local exchange carriers' standard collect calling rates; other ceilings are set specifically for inmate calls. Commissions are generally paid in these settings despite the price ceilings. We seek information from states on the use of rate ceilings. What is the extent of these rate ceilings: are there specific ceilings for intralata toll calls and intrastate long distance collect calls? We seek comment on what role the states play in setting ceilings and on the possible bases for the rate ceilings. We also seek comment on which states have the lowest rate ceilings, and what impact those low rate ceilings have on inmate payphone provider compensation. Further, we are interested in information from those states that have enacted "rate-friendly" inmate service contracting practices. For example, can state contracting policies be designed to encourage awarding contracts to vendors that offer inmates the lowest rates?

76. We also seek comment on alternatives to collect calling in the inmate environment that might result in lower rates for inmate calls while continuing to satisfy security concerns. Alternatives have been offered; some inmate facilities allow the use of debit cards or commissary accounts. Such arrangements eliminate operator services, billing and collection, and

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<sup>175</sup> See generally *supra* paras. 24, 36-38

<sup>176</sup> See *supra* paras. 27-29.

bad debt, which, according to data submitted to the Commission, constitute nearly 30% of inmate calling cost.<sup>177</sup>

77. The federal prison system has implemented a debit account system and, we are informed, offers rates better than many states do.<sup>178</sup> We seek comment on why other ICS providers cannot offer rates available in federal prisons. We seek comment on whether the reduced rates are being offered in some inmate environments but not in others, and what factors contribute to any differences. We would like specific information on why rates for calls of similar duration in the same state vary significantly depending on whether the call is made from a federal prison or a state prison. We also seek comment on how debit cards or commissary accounts are working in non-federal prisons and the resulting benefits to inmates. In particular, we seek comment as to whether such mechanisms are workable in all types of correctional facilities, including small jails with high inmate turnover. We note that some have stated that small jails cannot implement a debit card system due to the turnover rate.<sup>179</sup>

78. We also have been told of instances where the telephone calls are disconnected whenever there is a pause in conversation or after a given time period. This disconnect feature is in place to guard against three-way calling. Once disconnected, however, the inmate must call again resulting in a costly set-up charge. We seek comment on how pervasive this practice is and on solutions that would prevent three-way calling, but not result in premature disconnections. We seek comment on other inmate calling service practices that may serve legitimate security needs but have the unintended, and perhaps unnecessary, effect of increasing the costs incurred by inmates and their families.

79. Finally, we seek comment on any additional ways to reduce costs for inmate

<sup>177</sup> ICSPC *ex parte* statement at 3 (May 7, 2000).

<sup>178</sup> DynCorp IS LLC serves federal prisons, and U.S. Sprint currently provides long-distance services. According to available data, their direct dial rates are as follows:

<u>Call Type</u>	<u>Per Minute Rate</u>
Direct Dial – Local Calls	\$.04
Direct Dial—Long Distance	\$.15
Direct Dial—Canada	\$.25
Direct Dial—Mexico	\$.47
Direct Dial—International	\$.85

Collect calls, whether long-distance or local, are \$.40 per minute with a \$2.45 surcharge. U.S. Dept. of Justice, Bureau of Prisons, ITS-II Direct Telephone Call Rates (effective Aug. 9, 1998). In marked contrast to the federal prison rates, according to available data, in Florida, direct dial local calls are \$.12-.28 per minute and long distance is \$.40 per minute. *Florida Report* at 22.

<sup>179</sup> Cincinnati Bell Comments at 3-5.

service providers (and, consequently, the costs of inmate calling). Will their costs be reduced significantly as a result of our recent order addressing payphone line rates?<sup>180</sup> Are there other potential cost-cutting measures that the providers might undertake themselves or that this Commission or state public utility commissions might facilitate?

## V. PROCEDURAL MATTERS

### A. Initial Regulatory Flexibility Analysis

80. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>181</sup> the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above in Section B below. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>182</sup> In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.<sup>183</sup> In particular, we seek comment on commissions demanded by correctional institutions, whether and how any states have addressed the relationship between these commissions and the inmate calling rates, and on any factors unique to the provision of inmate calling services that affect the profitability of ICS operations. We also seek support and justification for any costs related to inmate calling services (such as depreciation, overhead, or return on investment) that ICS providers assert differ from the costs incurred with respect to ordinary payphones. Finally, we seek comment on whether and how the ICSPC proposals might be modified to ensure that increased revenues are in fact retained by the ICS providers and we seek comment regarding any other proposals that might address the problems identified by ICSPC.

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<sup>180</sup> *In the Matter of Wisconsin Public Service Commission, Order Directing Filing*, CCB/CPD No. 00-01, Memorandum Opinion and Order, FCC No. 02-25 (rel. Jan. 31, 2002)(requiring BOCs to set intrastate payphone line rates in compliance with the cost-based, forward-looking new services test).

<sup>181</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996). The Regulatory Flexibility Act of 1980, as amended (RFA), does not require that this Order contain a regulatory flexibility analysis of the possible significant economic impact on a substantial number of small entities. First, in the previous Payphone Orders, the Commission included Final Regulatory Flexibility Analyses (FRFA) addressing the possible impact of the rules, adopted in those orders, on small entities. This *Order on Remand* denies requests to modify the existing rules and leaves in place the Payphone Orders. In this present Order, the Commission neither promulgates nor amends Commission rules; therefore, our action does not affect those previous FRFAs. Second, this item contains a Notice of Proposed Rulemaking. Accordingly, an Initial Regulatory Flexibility Analysis (IRFA) related to this Notice is provided below.

<sup>182</sup> See 5 U.S.C. § 603(a).

<sup>183</sup> See *id.*



## 1. Need for, and Objectives of, the Proposed Rules

81. In this proceeding, we seek comment on the appropriate regulatory environment for Inmate Calling Service (ICS) providers. In choosing the appropriate regulatory environment we ask interested parties to address how the Commission can best achieve the goals set forth by Congress in section 276 of the Act.

## 2. Legal Basis

82. The legal basis for any action that may be taken pursuant to the Notice is contained in sections 4, 10, 201-202, 214, 276, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 160, 201-204, 214, 276, 303, and 403, section 706 of the Telecommunications Act of 1996, and sections 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216, of the Commission's rules, 47 C.F.R. §§ 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216.

## 3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules will Apply

83. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.<sup>184</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>185</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>186</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>187</sup>

84. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."<sup>188</sup> The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of

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<sup>184</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>185</sup> *Id.* § 601(6).

<sup>186</sup> *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

<sup>187</sup> 5 U.S.C. § 632.

<sup>188</sup> *Id.*

operation because any such dominance is not “national” in scope.<sup>189</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

85. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition specifically for small local exchange carriers. The closest applicable definitions for this type of carrier under SBA rules is for wired telecommunications carriers.<sup>190</sup> The most reliable source of information regarding the number of LECs nationwide appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).<sup>191</sup> According to our most recent data, there are 1,335 incumbent LECs.<sup>192</sup> We estimate that 1,037 of those carriers are small, pursuant to the SBA’s size standard.<sup>193</sup>

#### 4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

86. Any proposal we may adopt pursuant this Notice may decrease existing reporting, recordkeeping or other compliance requirements. As noted above, carriers are currently subject to a broad range of regulatory requirements that are generally intended to protect consumers from unjust and unreasonable rates, terms, and conditions and unreasonable discrimination in the provision of communications services. The Commission’s dominant carrier regulation includes rate regulation and tariff filing requirements,<sup>194</sup> and also requires supporting information, which in some cases includes detailed cost data, to be filed by dominant carriers with their tariff filings.<sup>195</sup> Incumbent LECs are subject to rate level regulation in the provision of their interstate

<sup>189</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

<sup>190</sup> 13 C.F.R. § 121.201, NAICS codes 513310.

<sup>191</sup> 47 C.F.R. § 64.601 *et seq.*; Trends in Telephone Service, FCC Common Carrier Bureau, Industry Analysis Division (rel. Dec. 2000) (Trends in Telephone Service).

<sup>192</sup> Trends in Telephone Service at Table 5.3. The total for competitive LECs includes competitive access providers and competitive LECs.

<sup>193</sup> *Id.*

<sup>194</sup> Section 203(a) of the Communications Act generally requires common carriers to file tariffs governing the provision of their basic communications services, although section 203(b)(2) gives the Commission broad authority to modify requirements made pursuant to this authority. 47 U.S.C. § 203 (a) & (b)(2) (1996).

<sup>195</sup> 47 C.F.R. § 61.38-39 (1999). Non-dominant IXC are prohibited from filing tariffs except for the limited purposes contained in 61.19(b) and (c). Non-dominant (competitive) LECs are permitted to tariff access charges within the limits set in the *CLEC Access Charge Order*, but may not tariff charges above those benchmarks.

access services.<sup>196</sup> The BOCs and GTE are subject to mandatory price cap regulation, and several other incumbent LECs have entered price caps on an elective basis, while smaller incumbent LECs are regulated under rate-of-return regulation.<sup>197</sup> In addition, in markets where carriers may have the incentive and ability to leverage control over bottleneck facilities to disadvantage competitors in related markets, the Commission has developed various safeguards to neutralize that ability.

## **5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

87. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>198</sup>

88. The overall objective of this proceeding is to establish an appropriate regulatory framework for ICS providers pursuant to section 276 of the Act. The Notice seeks comment on specific issues related to the provision of inmate payphone services, in particular, the costs associated with providing inmate calling services. As noted in paragraph 87, *supra*, we intend through this Notice and subsequent action, to reduce costs if possible. In addition to section 276 Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA). Its purpose, *inter alia*, is “to protect consumers who make interstate operator services calls from pay telephones. . . against unreasonably high rates and anti-competitive practices.”<sup>199</sup> We note, however, that, for the most part, the Commission has exempted inmate calling services from TOCSIA’s consumer protections on the grounds that inmate services constitute “an exceptional set of circumstances.”<sup>200</sup>

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<sup>196</sup> See 47 C.F.R. §§ 61.41-49 (price cap rules) & 65.1-65.830 (rate of return rules).

<sup>197</sup> See generally *MAG Plan Order*, 16 FCC Rcd 19613, 2001 WL 1381097.

<sup>198</sup> 5 U.S.C. § 603(c).

<sup>199</sup> S.Rep. No. 439, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1 (1990) (“The purpose of [the Act] is to protect telephone consumers against unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.”).

<sup>200</sup> Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744, 2752 (1991); see also *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274, 7301 (1996) (neither TOCSIA nor Commission rules require telephones for use only by prison inmates to be unblocked; prisons often install and maintain security equipment for a number of legitimate reasons involving security and other government prerogatives”).

## 6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

89. None.

### B. Comment Filing Procedures

90. Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>201</sup> interested parties may file comments within 45 days after publication of this Notice in the Federal Register and may file reply comments within 30 days after the date for filing comments. All filings should refer to CC Docket No. 96-128. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.<sup>202</sup> Comments filed through ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket number, which in this instance is CC Docket No. 96-128. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message: "get form<your e-mail address.>" A sample form and directions will be sent in reply.

91. Parties that choose to file comments or reply comments by paper must file an original and four copies of each, and are hereby notified that effective December 18, 2001, the Commission's contractor, Vistrionix, Inc., receives hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743. In addition, this is a reminder that, effective October 18, 2001, the Commission discontinued receiving hand-delivered or messenger-delivered filings for the Secretary at its headquarters location at 445 12th Street, SW, Washington, DC 20554.

92. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location will be open 8:00 a.m. to 5:30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's headquarters at 445 12th Street, SW, Washington, DC 20554. The USPS mail addressed to the Commission's headquarters is delivered to our

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<sup>201</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>202</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Capitol Heights facility for screening prior to delivery at the Commission.

<b>If you are sending this type of document or using this delivery method...</b>	<b>It should be addressed for delivery to...</b>
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (8:00 to 7:00 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail)	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12 <sup>th</sup> Street, SW Washington, DC 20554

93. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the Chief, Competitive Pricing Division, Common Carrier Bureau, Federal Communications Commission, at the filing window at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 96-128), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy -- Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12<sup>th</sup> Street S.W., CY-B402, Washington, D.C. 20554.

94. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12<sup>th</sup> Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at [qualexint@aol.com](mailto:qualexint@aol.com).

95. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules.<sup>203</sup> We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

<sup>203</sup> See 47 C.F.R. § 1.48.

### C. *Ex Parte* Presentations

96. This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>204</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>205</sup> Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.

97. Alternate formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 voice, (202) 418-7365 TTY, or [bmillin@fcc.gov](mailto:bmillin@fcc.gov). This *NPRM* can also be downloaded in Microsoft Word and ASCII formats at <http://www.fcc.gov/ccb/cpd>.

## VI. ORDERING CLAUSES

98. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4(i)-4(j), and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 276, the Petition for Partial Reconsideration and Clarification of the Inmate Calling Services Providers Coalition is DENIED.

99. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 4(i)-4(j), 201, 226 and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, 226, 276, this Notice of Proposed Rulemaking IS ADOPTED.

100. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order on Remand and Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

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<sup>204</sup> 47 C.F.R. §§ 1.1200-1.1216.

<sup>205</sup> See 47 C.F.R. § 1.1206(b)(2).

**APPENDIX A****LIST OF COMMENTS FILED**COMMENTS

American Friends Service Committee

AT&T Corp. (AT&T)

Cincinnati Bell Telecommunications Services (Cincinnati Bell)

Citizens United for Rehabilitation of Errants and the Coalition of Families and Friends of Prisoners of the American Friends Service Committee (CURE)

Gateway Technologies, Inc. (Gateway)

Inmate Calling Service Providers Coalition (ICSPC, Inmate Coalition, Coalition)

MCI WorldCom, Inc. (MCI)

RBOC/GTE Payphone Coalition (RBOC Payphone Coalition)

Utility Consumers' Action Network (UCAN)

REPLY COMMENTS

Citizens United for Rehabilitation of Errants and the Coalition of Families and Friends of Prisoners of the American Friends Service Committee (CURE)

Gateway Technologies, Inc. (Gateway)

Inmate Calling Service Providers Coalition (ICSPC, Inmate Coalition, Coalition)

MCI WorldCom, Inc. (MCI)

RBOC/GTE Payphone Coalition (RBOC Payphone Coalition)

Sprint Corporation (Sprint)